FARM CREDIT ADMINISTRATION
Washington, D. C.

SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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COOPERATIVE RESEARCH AND SERVICE DIVISION

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Organization of Independent Fishermen Not a Labor Union

The Columbia River Packers Association, a corporation engaged in the packing and canning of fish on the Pacific Coast, entered into a contract with the Pacific Coast Fishermens Union, which contract forbade the Association from buying fish from any fishermen who were not members of the Union. It appeared that the organization papers of the Union also forbade any members of the Union from selling fish to any buyer unless he purchased fish exclusively from members of the Union. Towards the end of the 1938 fishing season certain fishermen who were not members of the Union offered to sell their fish to the Association but were informed that the Association could not buy from them because of its contract with the Union. These nonunion fishermen thereupon threatened the Association with proceedings under the Federal Antitrust Laws. The Association was

> Caught between two fires -- the demand of the union that it renew the exclusive buying clause of the union contract, and the threat of the independent fishermen to claim damages from plaintiff (Association) if it does renew the exclusive buying clause -- plaintiff has now begun this proceeding at the opening of the 1939 fishing season for the adjudication of the legality of the exclusive buying clause in defendant's contracts.

The proceeding was instituted under the Sherman Antitrust Act for an injunction to prevent the Union from interfering with the Association buying fish from any source, for treble damages under that Act, and for other relief. (34 F. Supp. 970).

> Before beginning the suit, plaintiff offered to negotiate with defendant, in accordance with past practice, for a price to be paid on the season's catch, but refused to sign a contract containing the exclusive buying clause. Thereupon, defendant's members were notified by the union's officers not to sell fish to plaintiff. This suit was then filed.

The defendant Union contended that a labor dispute was involved

> and that the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101 et seq., which prohibits injunctions in labor disputes (except in cases involving fraud or violence), should apply. No fraud or violence is charged by plaintiff.

The Union also relied

for further justification of its challenged practices on the provisions of the Act of Congress of June 25, 1934, 15 U.S.C.A. § 521, authorizing fishermen to market collectively. This Act contains a provision that the Secretary of Agriculture (Secretary of Commerce) may order organizations of fishermen which market collectively, to cease and desist any operations which the Secretary has reason to believe restrain trade to the extent of unduly enhancing prices. The Act provides for injunctive proceedings by the Department of Justice, in the event that such orders by the Secretary are not observed. Defendant urged at the trial that this procedure is exclusive in any case where a monopolistic practice has sprung up, but the Supreme Court has lately rejected a similar contention in interpreting the Capper-Volstead Act, 7 U.S.C.A. § 291, after which the Fishermen's Collective Marketing Act was copied. United States v. Borden Company et al., 1939, 308 U.S. 188, 60 S. Ct. 182, 84 L. Ed. 181.

Defendant also denies that the case involves interstate commerce.

The trial court specifically held that a labor dispute was not involved. On the other hand, the court, referring to the "labor union" said:

> It is truly a cooperative marketing association, and we look to the law of cooperative marketing rather than to labor law in the determination of the legality of defendant's acts.

The court then expressed the view that the provision in the contract

> which forbids plaintiff from buying fish from others than members of the defendant union, and the clauses in the union's constitution and by-laws which forbid union members from selling to plaintiff and to others not contracting with the union on the exclusive terms demanded, are, * * * in restraint of trade and void.

The court further said, referring to the Union:

> Defendants' members are producers, just as cattlemen, grain growers, poultry raisers and orchardists, are producers. Could it be maintained that a cooperative association of any of the types of producers named, having substantial control of production in their given field, could require of all buyers that they

> agree not to buy from any other producers, and could forbid and prevent their members by fines and other disciplinary measures from selling to buyers who did not thus agree to buy only from members of the cooperative? Research by counsel during the week's trial and my own research has not disclosed so extreme a claim by any cooperative marketing association in the long history of cooperatives.

In view of the foregoing the court granted an injunction against the defendants.

The judgment as originally entered in the case provided for treble damages but later because of procedural deficiencies the trial court ordered that "the portion of the judgment awarding treble damages should be and it is hereby stricken."

The case was then appealed by the defendants to the Circuit Court of Appeals for the 9th Circuit (Hinton v. Columbia River Packers Association, 117 F. 2d 310) and that court being of the opinion that "a 'labor dispute' in fact existed", reversed the District Court, whereupon the case was carried to the Supreme Court of the United States, which court on February 2, 1942, held (Columbia River Packers Ass'n v. Hinton, 62 S. Ct. 520) that a labor dispute was not involved within the meaning of the Norris-LaGuardia Act. In reversing the Circuit Court of Appeals the Supreme Court said, in part:

> The Union acts as a collective bargaining agency in the sale of fish caught by its members. Its constitution and by-laws provide that "Union members shall not deliver catches outside of Union agreements", and in its contracts of sale it requires an agreement by the buyer not to purchase fish from nonmembers of the Union. The Union's demand that the petitioner assent to such an agreement precipitated the present controversy. Upon the petitioner's refusal, the Union induced its members to refrain from selling fish to the petitioner, and since the Union's control of the fish supply is extensive, the petitioner was unable to obtain the fish it needed to carry on its business.
>
> We think that the court below was in error in holding this controversy a "labor dispute" within the meaning of the Norris-LaGuardia Act. That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a "controversy concerning terms or conditions of employment, or concerning the association * * * of persons * * * seeking to arrange terms or conditions of employment" 29 U.S.C.A. § 113,

calls for no extended discussion. This definition and the stated public policy of the Act -- aid to "the individual unorganized worker * * * commonly helpless * * * to obtain acceptable terms and conditions of employment" and protection of the worker "from the interference, restraint, or coercion of employers of labor" 29 U.S.C.A. § 102 -- make it clear that the attention of Congress was focussed upon disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities.

We recognize that by the terms of the statute there may be a "labor dispute" where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a "labor dispute" may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. Our decisions in New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, 304 U. S. 542, 58 S. Ct. 703, 82 L. Ed. 1012, and Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U. S. 91, 61 S. Ct. 122, 85 L. Ed. 63, give no support to the respondents' contrary contention, for in both cases the employer-employee relationship was the matrix of the controversy.

The controversy here is altogether between fish sellers and fish buyers. The sellers are not employees of the petitioners or of any other employer nor do they seek to be. On the contrary, their desire is to continue to operate as independent businessmen, free from such controls as an employer might exercise. That some of the fishermen have a small number of employees of their own, who are also members of the Union, does not alter the situation. For the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours or other terms and conditions of employment of these employees.

Attention is called to the fact that the Supreme Court of the United States did not pass upon the validity of a provision in a contract entered into by a cooperative marketing association of fishermen with a buyer of its commodities which forbade the buyer from purchasing similar commodities from others, nor upon the question of whether a provision in the organization papers of such

an association forbidding its members to sell only to purchasers who purchased fish exclusively from members of the association was valid. It is believed that this is the only case involving a cooperative marketing association which has specifically presented these questions. In view of the fact that the association was an organization of fishermen apparently meeting the conditions of the Federal statute for fishermen, which is identical in principle with the Capper-Volstead Act, this case is of direct interest to agricultural cooperative marketing associations. A holding by the Circuit Court of Appeals on the questions outlined will be awaited with interest.

15 U.S.C.A. 14, which is part of the Clayton Act (38 Stat. 731) has a direct bearing on the question under discussion. This section reads as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares,merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

If a stipulation like that referred to would be invalid in a contract of a private corporation, it is believed that it would under like circumstances be invalid in the contract of an agricultural cooperative marketing association, because the Capper-Volstead Act does not confer upon associations which meet its conditions the right to enter into contracts with third persons, which would be invalid if entered into by others under comparable conditions. (United States v. Borden Company et al., 308 U.S. 188, 60 S. Ct. 182, 84 L. Ed. 181).

In Radio Corporation v. Lord, 28 F. 2d 257, it was held that a contract entered into by the corporation with a dealer which in effect forbade the dealer to buy radio tubes from others, was a violation of the code section quoted above. See also: Q.R.S.

Music Co. v. Federal Trade Commission, 12 F. 2d 730; Fashion Originators Guild of America v. Federal Trade Commission, 61 S. Ct. 703, 63 L. Ed. ___.

A sharp distinction must be drawn between a contract which forbids the buyer to acquire like commodities from others and a contract under which the seller agrees to furnish the buyer with all of a particular commodity that the buyer may need. Undoubtedly the district court had this distinction in mind, for in the opinion of that court it is said:

> Since the union's contract does not guarantee a supply of fish, where would the canneries get fish, having agreed to look to the union for their sole supply? Surely reasonable men will agree that the public's interest in an important item of food supply should not be put in such jeopardy. If an exclusive and monopolistic arrangement, as here insisted upon, can be legally made as to fish, it can be made as to milk, as to meat, and as to other necessities of life.

Contracts under which buyers agree to purchase all of a particular commodity that they may need from a given seller have been in general use for many years and where entered into under normal conditions they have usually been upheld. (Federal Trade Commission v. Curtis Publishing Company, 260 U.S. 568, 43 S. Ct. 210, 67 L. Ed. 408; Barnes v. Dairymen's League Cooperative Ass'n., 222 N. Y. S. 294, 220 App. Div. 624; Dairy Co-Operative Association v. Brandes Creamery, 147 Ore. 488, 30 P. 2d 338, 147 Ore. 503, 30 P. 2d 344; Stark County Milk Producers' Association v. Tabeling, 120 Ohio St. 159, 194 N. E. 16, 98 A. L. R. 1393; 3 Williston on Contracts, p. 2896; Fletcher Cyclopedia Corporations, Permanent Edition, Vol. 10, sec. 5010, p. 836).

Obviously, if a buyer is obtaining all of a particular commodity which he needs from a seller, his requirements are being met and there is no occasion for him to deal with others. A full supply contract entered into in a fair and normal manner appears legal. If a purchaser may not contract to buy from one source all of a particular commodity which he needs, the question would be presented of determining what percentage of his requirements may be so purchased.

On the other hand, such a contract would not obligate the purchaser not to buy from others if the other party to the contract should fail to meet or should be unable to meet fully, the purchasers requirements, whereas the exclusive supply contract under consideration in the Fishermen's case would have that effect, at least by its terms, and accordingly would appear to be, potentially, at least, a more rigorous restraint upon commerce than ordinary full supply contracts.

State Regulation of Milk Sold on United States Military Reservations

The Supreme Court of California has recently decided two cases which at this time should be of considerable interest to cooperative associations of dairy farmers. The State of California in 1935 enacted a statute providing for regulating the marketing and distribution of fluid milk and fluid cream. This Act was amended in 1941. As amended, it empowered the Director of Agriculture of that State to set up defined marketing areas within the State, to prescribe minimum prices for fluid milk and fluid cream to be paid by distributors to producers in accordance with stabilization and marketing plans for such areas; to prescribe minimum wholesale and retail prices of fluid milk and fluid cream within such areas; to license milk distributors; and to revoke or suspend licenses for violation of any stabilization or marketing plan. The Director of Agriculture of the State initiated proceedings against the Pacific Coast Dairy, Inc., looking to a revocation of its license as a milk distributor. The Pacific Coast Dairy, Inc. then applied for a writ of mandamus to the Supreme Court of the State for the purpose of compelling the State Department of Agriculture and the Director of Agriculture to dismiss the proceeding for a revocation of its license. Pacific Coast Dairy v. Department of Agriculture, (Calif.) 123 P. 2d 442. The basis of the proceeding for the revocation of the license was "the purchasing, processing, bottling, transporting, delivering, and other handling of milk within the Santa Clara Marketing Area for prospective sale at a point outside the jurisdiction of the State at prices less than the minimum prescribed for that marketing area."

It appeared that the milk distributor had made sales of milk to the Federal government at less than the minimum wholesale prices prescribed for that area. "The sale occurred on Moffett Field, territory within the geographic boundaries of the Santa Clara Marketing Area, but subject to the exclusive jurisdiction of the federal government."

Section 736.3 (a) (6) of the Agricultural Code which contains an amendment to the statute enacted in 1935 for regulating the marketing and distribution of milk provided that:

> any stabilization and marketing plan shall prohibit distributors and retail stores from engaging in such unfair practices as, "(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area."

The foregoing statutory provision, it will be observed, applied exclusively to acts and transactions occurring in the State of California on land subject to its jurisdiction. In this connection the court said:

> The question is not whether the State can prescribe the minimum prices at which milk may be sold on the territory within the exclusive jurisdiction of the United States. (CF. Consolidated Milk Producers v. Parker, Cal. Sup., 123 P. 2d 440, this day decided), but whether it has power to regulate acts within its jurisdiction even though they are followed in direct line of succession by a transaction outside its jurisdiction.

The statute in question specifically prohibited:

> The payment of a lesser price by a distributor to any producer for fluid milk or fluid cream which is distributed to any person, including agencies of the Federal, State or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices established by the director to be paid by distributors to producers for fluid milk or fluid cream for said marketing area.

The milk distributor contended that the State of California did not have authority to prevent the sale of milk by it to the Federal government on territory subject to its exclusive jurisdiction. After citing a number of cases which were not consistent with this contention, the court said:

> The foregoing cases establish that a State may exercise its power over things within its jurisdiction in the knowledge that it will thereby influence things beyond its jurisdiction, and that its influence may be far reaching, so long as the external consequences remain incidental to the solution of internal problems. Their application to the present case is clear. In accomplishing the objectives of the State Milk Control Act the State is concerned, not with the destination and sale of the milk but with the effect of the price of the milk upon the conditions of production. A price below the fixed minimum for milk produced in the State endangers those established standards for the milk industry that safeguard the public health, and leads successively to a breakdown of the law, price cutting, diminishing returns to the producers, inferior standards of milk production and finally injurious effects on the public

health. The State has regulated the purchasing, processing, bottling, transporting and handling of fluid milk within its jurisdiction with the object, not of controlling transactions beyond its jurisdiction, but of stabilizing within its jurisdiction the production of a commodity vital to the public health.

The court inquired into the question of whether the State Milk Control Act was valid from the standpoint of the commerce clause in the Federal Constitution, and the Federal Agricultural Marketing Agreement Act of 1937. The court expressed the opinion that the shipments of milk from California to such areas as Moffett Field fall within the definition of interstate commerce, as expressed in the Federal Agricultural Marketing Agreement Act of 1937, and stated that Moffett Field could be classified "as either a territory or possession of the United States outside the jurisdiction of California, even though within the State's boundaries." The contention was made, however:

> that transactions between such federal areas as Moffett Field and the rest of the State do not come within the power of Congress to regulate interstate commerce, because such areas do not fall within the categories of States, foreign nations, or Indian tribes set forth in the commerce clause. The judicial interpretation of the commerce clause, however, has greatly amplified the meaning of interstate commerce.
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> The federal territory within the State is so fragmented that there may be several federal islands within a single marketing area. If they are citadels of immunity from State jurisdiction, they are also exceptional segments in areas that are otherwise subject to that jurisdiction. They stand out like colored pins on the map of California, and range from military reservations to soldiers' homes, from court houses to penitentiaries, from post offices to Indian reservations, from national parks to regional dams. See cases cited in 38 Columbia L-Rev. 128, at 130. The commerce between them and the rest of the State is of the greatest interest to the State regardless of the circumstance that it may be regulated by the federal government. Focussed as it is upon a State problem, the State act, despite its repercussions upon interstate commerce, does not run counter to the commerce clause so long as it does not conflict with the provisions or objectives of Congressional legislation. Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752;

Duckworth v. Arkansas, 62 S. Ct. 311, 861 L. Ed. ___; California v. Thompson, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219; South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734. See 27 Cal. L. Rev. 615.

* *

Public health, like public safety, is a vital concern of the State, and its maintenance at proper levels should likewise not wait upon federal regulation. Toward that maintenance the California Milk Control Act contributes largely, but it might well be disrupted if those engaged in interstate commerce escaped the State regulation while they were untouched by corresponding federal regulation. The absence of federal regulation may well be a recognition not only of the propriety but of the effectiveness of State regulation in the stabilization of a dominantly local industry, rather than a ruling that there should be no regulation.

It was further urged in a brief filed as amicus curiae on behalf of the United States by the United States Attorney, that the State Milk Control Act could not legally affect sales of milk to instrumentalities of the United States. In answer to this contention the court said in part:

The California Milk Control Act does not discriminate against the United States army nor substantially hinder its efficient operation. The army is not precluded from obtaining milk, nor required to pay more for such milk than other consumers in the same area. The act regulates not the army but the distributors who are independent contractors with the federal government. It is settled that such contractors are subject to State control, and that any consequent burden on the federal government is speculative and remote.

In brief, the court held that the violation of section 736.3 (a) (6) of the Agricultural Code of California constituted a cause for revoking the license of the milk distributor even though the milk involved in the violation was sold to the Federal government on land subject to its jurisdiction.

In the case of Consolidated Milk Producers v. Parker (Cal.), 123 P. 2d 440, the general facts involved were similar to those outlined in the foregoing case, with this important exception, that the alleged illegal transactions involving the sale of milk to the Federal government and on territory over which the Federal government had exclusive jurisdiction, took place before the amendments adopted in 1941 to the

State Milk Control Act. In other words, at the time the alleged illegal transactions took place the State statute did not forbid the purchasing, receiving and handling of milk on territory over which the State had jurisdiction that might subsequently be sold at prices less than those fixed by the Director of Markets of the State. As stated by the court:

> The alleged violations relate solely to the sale of milk in the Presidio at less than the minimum prices established for the San Francisco marketing area and not to the performance of any acts in violation of law outside the Presidio. Under the law in effect at the time of the alleged violations there was no provision prohibiting the unfair trade practices now described in section 736.3 (a) (6) of the Agricultural Code. The power of the State to regulate activities within its jurisdiction that may affect activities within the Presidio (Cf. Pacific Coast Dairy Inc. v. Dept. of Agriculture, Cal. Sup., 123 P. 2d 442, this day decided) is therefore not involved in this case.

Therefore, the court held in effect that the State Milk Control Act as originally enacted did not affect sales of milk to the Federal government on territory over which it had exclusive jurisdiction; and that such "violations" did not furnish a basis for the revocation of licenses of milk distributors.

Association Exempt from Georgia Occupation Tax

The Commissioner of Revenue for the State of Georgia instituted proceedings against the Georgia Milk Producers Confederation (Forrester v. Georgia Milk Producers Confederation, (Ga.) 19 S.E. 2d 183), to collect an occupation tax which was alleged to be due by the Confederation for engaging in the manufacture of ice cream in the year 1937. The Confederation was incorporated under the Cooperative Marketing Act of Georgia, which contains the following provision:

> Each association organized hereunder shall pay an annual license fee of $10, but shall be exempt from all franchise or license taxes

The Confederation contended that the provision just quoted operated to exempt it from the payment of the occupation tax. The court first inquired into the question of whether the Confederation was authorized to engage in the manufacture of ice cream. In view of the fact that the Cooperative Marketing Act of Georgia authorized associations incorporated thereunder to engage in the processing of any agricultural products produced or delivered to it by its members, or in the manufacture and marketing of the byproducts thereof, and further authorized such associations to do everything that was necessary or proper in the accomplishment of any one of the purposes, or the attainment of any of the objects enumerated in the statute, the court found that the Confederation was "within its charter powers in the manufacture of ice cream from milk delivered to it by its members." Although the court did not specifically say so, it apparently inquired into the activities in which the association was engaged, for the purpose of determining if, as a matter of law, it was authorized to engage in the manufacture of ice cream. It is assumed that this was done on the theory that if the association was engaged in the manufacture of ice cream without authority of law, that the exemption contained in the Cooperative Marketing Act would have no application to such unauthorized activities. This was the theory that was followed by the Supreme Court of Virginia in a case arising under the Cooperative Marketing Act of that State, which contained a provision similar to that quoted above and in which the court held that the Virginia association was liable for sales taxes on commodities which it was not authorized to handle. (Rockingham Cooperative Farm Bureau, Inc. v. City of Harrisonburg, 171 Va. 339, 198 S. E. 908). (Summary No. 1, page 2). Having ascertained that the Confederation was authorized to engage in the manufacture of ice cream from milk delivered to it by its members, the court then passed to a consideration of what the Legislature of the State meant when it used the exemption language quoted above. In this connection the court said:

> What is meant by "all franchise or license taxes" in Code § 65-225? Is "franchise" to be construed to mean the same as "license," or is "license" to be construed to mean the same as "franchise"? Of course, if the words are not used as synonyms, and the "or" is construed to mean "and," clearly the defendant is exempt from the payment of the license tax, which is the same as an occupation tax, as herein used. City of Waycross v. Bell, 169 Ga. 57, 149 S. E. 641; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The word "franchise" has been used to denote various meanings. The true meaning "is the privilege of doing that 'which does not belong to the country generally by common right.'" 23 Am. Jur. 714, § 2. Code § 92-2301 defines "special franchise", and it will be observed that the term "special franchise" is the same as "franchise" when the latter is used in its true sense. The section ends with the following expression: "But the term 'special franchise' shall not include the mere right to be a corporation engaged in trading or manufacturing and exercising no special franchise above enumerated." It will be observed that the defendant and like corporations are not empowered to own a franchise, in the true sense of the word, which would be subject to taxation as property. Likewise, we know of no case in which a tax on capital stock has been called a "franchise" tax, so we are driven to the inescapable conclusion that the legislature did not use the word in its true sense, or as meaning "capital stock," but used it in a loose and more general sense, as being synonymous with "license", which in turn is synonymous with "occupation tax." Code § 92-2401, providing for taxes on certain corporations, also uses the words "license" and "occupation" tax synonymously.
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> Under the provisions of Code § 65-225 the defendant is exempt from the payment of the occupation tax fixed upon the manufacturers of ice cream under Ga. laws, 1935, p. 36, § 57. The statute is susceptible of only one reasonable construction.

Only a few cases have been passed upon by courts of last resort, involving the scope and meaning of exemption provisions like that contained in the Georgia Cooperative Marketing Act, although similar provisions appear in the Cooperative Marketing Acts of a number of the States.

In the case of O'Neil v. United Producers & Consumers Co-op. (Ariz.), 113 P. 2d 645, the Supreme Court of Arizona held that the exemption provisions did not apply to a sales tax imposed by an Excise Revenue Act enacted some fifteen years subsequent to the passage of the Cooperative Marketing Act of that State. The court specifically held that:

> the sales tax is not a license tax within the meaning of this term, as used in the expression "exempt from all franchise or license taxes." It is an excise tax imposed by the legislature in the exercise of its taxing power for the purpose of raising revenue and in no sense of the term for regulation.

It is interesting to note that it was urged in this case that the terms of the sales tax statute were so broad as to amount to a repeal by implication of the exemption contained in the Cooperative Marketing Act, but the court found that it was unnecessary to pass upon this point. As it is believed that all of the States reserve the right to amend the charters of corporations incorporated under their laws, it would appear that a State by a later statute could repeal, either specifically or by implication, the exemption contained in its Cooperative Marketing Act.

It was further argued in the Arizona case that the definition of "business", as given in the Excise Revenue Act, did not include the activities of the association. In answer to this contention the court said:

> It is suggested by appellee that section 73-1302, Arizona Code of 1939, which defines business within the meaning of the Excise Revenue Act, excludes or exempts from the payment of the sales tax those businesses that are not carried on for the purpose of gain or advantage. The portion of the section referred to reads: "'Business' includes all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage either direct or indirect, but not casual activities or sales." It could hardly be seriously contended that those who organized the United Producers and Consumers Co-operative or those who later became members of it by the payment of the required fee, in order that they might purchase goods, wares and merchandise at cost, had no idea of gain, benefit or advantage to themselves. And any activity carried on by the corporation which benefits its organizers or members constitutes business within the meaning of this provision.

In an Arkansas case (McCarroll) v. Ozarks Rural Electric Cooperative Corporation, 146 S. W. 2d 693) the members of the electric cooperative were held liable for sales taxes on electricity furnished to them by the cooperative. The basis for this holding is disclosed in the following quotation from the opinion:

> There can be no question that the sale by retail of electricity to a consumer, generally, for his use is subject to this sales tax under § 4 of act 154 of 1937, which provides: "The tax imposed by this section shall apply to * * * (D) All retail sales of electric power and light, natural and artificial gas, water, telephone use and messages and telegrams." § 14070, Pope's Digest.
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> It is the contention of appellee here, however, that the sales which it makes to its individual members are exempt from this two percent sales tax by virtue of the provisions of § 30 of act 342 of 1937, which was the basic act creating rural electric cooperatives such as appellee. Section 30 provides: "Exemption from Excise Taxes - License Fee. Corporations formed hereunder shall pay annually, on or before July first, to the Secretary of State a fee of $10 for each 100 members or fraction thereof, but shall be exempt from all other excise taxes of whatsoever kind or nature, except as provided in this Act". § 2344, Pope's Digest.
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> It seems clear that the purpose of this section is to exempt appellee (the cooperative) from paying excise taxes on all property and purchases made by it, but does it exempt its individual members, to whom it makes sales and who are subject to the provisions of the sales tax law, from the payment of the tax?
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> Appellant's contention is that the sale of electricity by appellee to its individual members constitutes a retail sale within the meaning of the sales tax law, that these member-consumers are liable for the payment of the tax, and that appellee (cooperative) must collect these taxes from its members and remit the same to the commissioner of revenues.
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> It is our view, therefore, that the legislature intended to, and did under the provisions of act 342 of 1937, exempt appellee from all excise taxes of every kind after it shall have paid to the secretary of state $10 for each 100 of its members or fraction thereof, in accordance with the provisions of § 30, supra. But we

cannot agree with appellee that the distribution of its electric energy was no more than an inter-corporation transference of its assets and not a retail sale to such members.

It is our view that appellee's distribution of its electric energy to its individual members was clearly a retail sale and subject to the two percent sales tax in question, and that the position of its members as regards the payment of this sales tax, is not different from that of other people who buy electricity from producers and must pay the tax.

Cooperative Barred from Recovering on Contract Violating Milk Marketing Order

In the case of United States v. Dake, 43 F. Supp. 833, it appeared that agents of a cooperative association entered into a contract for the sale of milk which was signed by the agents as individuals, although it appears that they were actually acting for and on behalf of the cooperative association. By the terms of the contract milk was to be furnished at less than the price fixed in a milk marketing order. In holding that the cooperative association could not recover from the buyer of the milk because the contract violated the milk marketing order, the court said in part:

> If two parties make a contract which is in violation of law, such contract is invalid and illegal. So, if Saratoga (a cooperative), through its agents Dake, made a contract for the sale of milk which was in violation of Order 27, such contract was invalid and illegal and no recovery could be had by Saratoga on such a contract. Mills v. McNamee, 194 App. Div. 932, 184 N.Y.S. 613; Stone v. Young, 210 App. Div. 303, 206 N.Y.S. 95; Hart v. City Theatres Co., 215 N.Y. 322, 325, 109 N. E. 497; Ridgely v. Keene et al., 134 App. Div. 647, 119 N.Y.S. 451; Adler v. Zimmerman, 233 N.Y. 431, 135 N. E. 840.
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> Parties are chargeable in law with knowledge of the terms of the contract which they sign. Not only are they so chargeable but Saratoga at least undoubtedly knew that the contract did not comply with Order 27 and was therefore invalid and illegal.
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> Therefore, in view of the law as above set forth, neither party to such an illegal contract can recover against the other, and Saratoga cannot recover anything against Gold Medal.

The principle applied in this case is a fundamental and general one. In the case of Ayulo v. Mollen, Thompson & James Co., 283 Fed. 863, the court held that a contract, for the sale of sugar, entered into in the first World War by an unlicensed dealer in violation of the President's Proclamation of September 7, 1917, issued pursuant to authority given by the National Defense Act of August 10, 1917, was void and that an action could not be maintained thereon. In reaching this conclusion, the court declared:

The authorities as to when a contract entered into in violation of law is absolutely void and will not support an action are too numerous to review. The general principles are correctly stated in 13 Corp. Jur. §§351, 352, 353, and 354; note, 12 L. R. A. (N. S.) 575. See also Rose's Notes to Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759. The United States Supreme Court cases in point are Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; Waskey v. Rammer, 223 U. S. 85, 94, 32 Sup. Ct. 187, 56 L. Ed. 359. The Sixth Circuit Court of Appeals cases in point are Coweta Fertilizer Co. v. Brown, 163 Fed. 162, 89 C. C. A. 612; Carland v. Heckler, 233 Fed. 594, top page 506, 147 C. C. A. 390; Reichardt v. Hill, 236 Fed. 817, 150 C. C. A. 79; Western Indemnity Co. v. Wm. H. Crafts et al., 240 Fed. 1, 153 C. C. A. 37.

In Bituminous Coal Act the phrase "A Bona Fide and Legitimate Farmers' Cooperative" excludes consumers' cooperatives

The Bituminous Coal Act (15 USCA 828) authorizes the fixing of minimum and maximum prices for coal, which under the Act is done by the Director of the Bituminous Coal Division of the Department of the Interior.

> * * * Congress provided in Section 4 II (e) of the Act that "No coal * * * shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established * * *." From this broad prohibition Congress authorized only two exceptions. In Section 4 II (h) it authorized the allowance of discounts (in the amounts prescribed by the Division) from the minimum prices on sales of coal to "distributors" who purchase coal for the purpose of resale and in the last paragraph of Section 4 II (i) it made a similar exception for coal sold to a bona fide and legitimate farmers' cooperative" or to its "intervening agency."
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> In furtherance of the Congressional policy of permitting sales of coal to distributors and farmers' cooperatives the Division has set up a system of registration under which the maximum discounts prescribed by the Director are allowable only to those distributors and bona fide farmers' cooperatives which are registered with the Division. Registration is afforded a distributor upon a showing that he is actively, continuously, and regularly engaged in the business of purchasing coal for resale. It is stated by counsel that "the Division has since October 1, 1940, granted registration to 1,987 distributors. Registration is awarded a farmers' cooperative upon a showing that it is a bona fide and legitimate farmers' cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States. To date the Division has registered twenty-three bona fide and legitimate farmers' cooperatives and four intervening agencies."

The Midland Cooperative Wholesale applied for registration as a distributor, but its right to so register was denied. It then unsuccessfully brought an action for the purpose of reviewing the Order refusing it the right to register as a distributor of coal. (Midland Cooperative Wholesale v. Ickes, 125 F. 2d 618). The refusal to register the cooperative as a distributor "was based on the conclusion that petitioner's distribution of its net income on the

basis of patronage comes within the prohibition of paragraph 12 of Section 4 II (i) of the Act against securing for its patrons 'either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act (subchapter)' and that it can only be excepted from the prohibition as specified in paragraph 13 of Section 4 II (i), in respect to its business with 'bona-fide and legitimate farmers' cooperative organization (s).'"

The court said:

> The essential facts are not disputed and it clearly appears from the evidence and findings of the Director that Midland Cooperative Wholesale, petitioner, is a nonprofit wholesale cooperative organized in 1926 under the laws of Minnesota. It is owned by approximately 200 retail cooperative associations operating in Minnesota, Wisconsin, Iowa and South Dakota. Those retail associations are composed of approximately 110,000 individual members of whom over 85 per cent are farmers. All these constituent associations are not farmers' cooperatives but many fall within the category of consumers' cooperatives. Petitioner serves in the capacity of a wholesaler to (or purchasing agent for) its member cooperative associations, supplying them with many types of commodities. Since 1934 petitioner has been supplying bituminous coal to about 45 of its constituent retail associations. The coal purchased by petitioner is purchased chiefly from mines operating in West Virginia and eastern Kentucky and shipped to the retail associations by rail or lake. Petitioner's annual sales to its retail associations have amounted to about 600 carloads or about 24,000 tons of coal. All coal handled by petitioner is purchased for resale and is resold in not less than cargo or railroad carload lots.
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> Under the Minnesota law and petitioner's by-laws (par. 7, ch. 382, Laws of 1919, amended by ch. 23 of the Laws of 1921 and ch. 326 of the Laws of 1923; By-Laws, Art. VII), petitioner is required annually to distribute its "undivided surplus" or "net income" on the basis of patronage. Patronage dividends are distributed to each constituent retail association on the basis of gross operating margins on the total quantity of each major commodity purchased by it. If petitioner were permitted to register as a "distributor" or otherwise permitted to purchase coal at a discount from the established prices the amount so derived and not expended in connection with the resale of the coal, and

all other amounts made from the resale of the coal and not so expended, would be available for distribution to its constituent members as a patronage dividend.

In holding that the only cooperative associations which were eligible to receive discounts permitted by the Director of the Bituminous Coal Division under that Act were farmers' cooperatives, the court said in part:

> The phrase "bona fide and legitimate farmers' cooperative" is not uncertain or ambiguous and there is nothing in the Act to indicate that the words were used in other than their customary and understood meaning. The form of the phrase is obviously chosen to accentuate the particular type of cooperative organization to be distinguished from other types of cooperative organizations and the other types are excluded. To expand the exception of paragraph 13 by identifying a consumers' cooperative with the farmers' cooperative would violate the cardinal rule of statutory construction which requires exceptions to be strictly construed. Also the description in paragraph 13 of a particular type of cooperative which is to be excepted from the general prohibitions of paragraph 12 necessarily excludes other types on the principle of expressio unius est exclusio alterius.
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> The phrases "farmers' cooperatives" and "consumers' cooperatives" are words of art which have acquired a fixed meaning through judicial interpretation and otherwise. See Garden Homes Co. v. Commissioner, 7 Cir., 64 F. 2d 593, 596; Sunset Scavenger Co. v. Commissioner, 9 Cir., 84 F. 2d 453, 455; National Outdoor Advertising Bureau v. Helvering, 2 Cir., 89 F. 2d 878, 880; Cooperative Central Exchange v. Commissioner, 27 B.T.A. 17. Numerous federal statutes expressly restrict their provisions to farmers' cooperatives, whereas others refer either to cooperatives generally or to specified types of cooperatives. For example, Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A. § 17, Section 1 of the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C.A. § 291, the Agricultural Credit Act of 1923, 42 Stat. 1479, 12 U.S.C.A. § 351, Section 15 (a) of the Agricultural Marketing Act, 49 Stat. 317, 12 U.S.C.A. § 1141j; Section 203 (b) of the Motor Carrier Act, 49 Stat. 544, 49 U.S.C.A. § 303 (b); and Section 3 (a) (5) of the Securities Act of 1933, 48 Stat. 75, 15 U.S.C.A. § 77 (c), are limited by their terms to farmers' cooperatives.

> On the other hand Section 4 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C.A. § 13b, refers to cooperative organizations generally while the District of Columbia Cooperative Association Act, 54 Stat. 480, Pub. No. 642, 76th Cong., 3d Sess., refers to consumer cooperative associations alone. (Section 3).
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> Laws fostering cooperative marketing and purchasing by farmers have a common genealogy. They stem from a desire on the part of federal and state legislators to extend to farmers ways to enable them to counteract the effects of an increasingly urban economy. See Tigner v. Texas, 310 U.S. 141, loc. cit. 145 et seq., 60 S. Ct. 879, 84 L. Ed. 1124, 130 A.L.R. 1321; Liberty Warehouse Co. v. Burley Tobacco Growers' Cooperative Marketing Ass'n, 276 U.S. 71, loc. cit. 92, 96, 48 S. Ct. 291, 72 L. Ed. 473; see, also, Hearings before a Subcommittee of the Senate Committee on Agriculture and Forestry on S. 2605 (Bill to Amend Agricultural Marketing Act), 76th Cong. 3d Sess., passim; Hanna, Law of Cooperative Marketing Associations (1931), ch. 1. Some differentiation in treatment designed to encourage agriculture or related activities has customarily been sustained. Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Ass'n, supra; Minnesota Wheat Growers' Co-op. Marketing Ass'n v. Huggins, 162 Minn. 471, 203 N. W. 420. The time may well come when the legislators will choose to extend the same or other encouragement to consumers' cooperatives. But, at least in the Coal Act, Congress has not taken that step.

Apparently the court was of the opinion that entirely independent of the fact that the cooperative paid patronage dividends, it was not eligible to receive discounts from the established minimum prices for coal. In this connection it was said:

> It is the nature of petitioner's activities which disqualifies it from obtaining authorization to accept discounts from the established minimum prices. Petitioner is not like conventional wholesalers, engaging in the business of buying coal and then reselling it to such customers as it is able to find; it is not a distributive agency standing between producer and consumer and independent of both; it is a "purchasing agent" for its member associations. As such it is an "instrumentality of retailers" within the provisions of paragraph 12 of Section 4 II (i) - or Rule 12 of Section XIII of the Marketing Rules and Regulations - and therefore is prohibited from receiving any discounts

from the established prices. This prohibition applies irrespective of whether or not petitioner thereafter distributes any part of this discount to its member associations in the form of a patronage dividend. The prohibition is against the acceptance of the discount without regard to whether the discount is subsequently passed on to the member associations. Petitioner's argument that it should not be denied registration as a distributor until it has actually distributed patronage dividends on its coal business, must, therefore, be rejected.